Filed 3/7/19 P. v. Fang CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE XENG FANG,

Defendant and Appellant.

F074516

(Super. Ct. Nos. F16901352 & F16901135)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christopher J. Rench, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant George Xeng Fang was charged with numerous crimes arising out of two separate incidents. He was acquitted of all charges from the first incident and convicted of shooting at an inhabited dwelling, assault with a firearm, and felon in

possession of a firearm arising out of the second incident, where he shot an acquaintance in the back from his vehicle while the acquaintance was on his screened porch. He received a 19-year sentence, including among other enhancements, a five-year prior serious felony enhancement pursuant to Penal Code section 667, subdivision (a),[1] plus a 25-year-to-life firearm enhancement pursuant to section 12022.53, subdivision (d).

On appeal, he contends his convictions must be reversed on the following grounds: (1) the court erred by admitting evidence of the existence of a restraining order prohibiting appellant from having contact with his wife; (2) the court erred by denying his request for a trial continuance to consider and research a motion for mistrial regarding stricken testimony mentioning appellant's arrest for an uncharged act, or alternatively, the court erred by denying appellant's oral motion for mistrial due to the prejudicial nature of the testimony; and (3) that reversal is required due to the cumulative prejudice of the errors. Appellant, in supplemental briefing, also contends the matter should be remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancement pursuant to Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill No. 620) and the prior serious felony enhancement pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill No. 1393).

We agree the matter should be remanded for the limited purpose of permitting the trial court to exercise its discretion whether to strike the firearm and prior serious felony enhancements. We affirm the judgment in all other respects, finding that errors, if any, were clearly harmless.

FACTUAL AND PROCEDURAL BACKGROUND

The case against appellant was based on two incidents: one that occurred on February 19, 2016, and one that occurred on February 21, 2016.

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[1] All further statutory references are to the Penal Code.

February 19, 2016, Incident

In relation to the February 19, 2016, incident, appellant was charged with assault with a deadly weapon and dissuasion of a witness on appellant's uncle, Toua Her. On February 19, 2016, Her and his friend, Jerry Khang, were outside Her's residence working on cars. Her and Khang testified that appellant came to the residence. Her was on the floor jacking up a car. Khang testified that at one point, he turned to see appellant holding a hammer above his head as if he were going to swing it down on Her's head. Khang grabbed appellant's hand and pushed him away. Her testified he did not see appellant pick up the hammer. Her stated he had turned around to see appellant and Khang struggling and yelled for his girlfriend, who was inside the house, to call the police. Khang, Her, and Her's girlfriend testified that appellant stated if they called the police, he would shoot or kill them.

Appellant testified in his own defense. As to the first incident, appellant stated he saw a hammer on top of the car that may fall on Her, so he grabbed it, and was going to place it on a shelf, when Khang grabbed his arm. Appellant denied threatening anyone, and when Her mentioned calling the police, appellant told him go ahead because he did not do anything wrong.

February 21, 2016, Incident

In relation to the February 21, 2016, incident, appellant was charged with attempted murder with premeditation and deliberation of Dao Vang, assault with a firearm on Vang, shooting into an inhabited dwelling, and felon in possession of a firearm. On February 21, 2016, appellant went to Vang's house and wanted to talk to him. Vang told him no and asked him to leave, and appellant got back into his vehicle. Vang testified that he then heard what sounded like appellant cocking a firearm. Vang had seen appellant with a firearm a few days prior. Appellant parked next to Vang's house and tried to call Vang out to his vehicle, and Vang refused. Vang heard appellant cocking a firearm again, and Vang crouched because he thought he might get shot. He

then heard three bangs and was shot in the back. Vang testified that no one else was outside his house besides appellant. Appellant was arrested a few hours later driving the same vehicle he was driving at Vang's house. Law enforcement swabbed appellant's hands and the inside of the vehicle for gunshot residue. Both of appellant's hands and the interior passenger upper door tested positive for gunshot residue, meaning appellant's hands and the door panel were in the vicinity of the discharge of a firearm or came into contact with some surface that had gunshot residue. A .40-caliber bullet casing was found in the inside of the vehicle. The bullets that were shot toward Vang were .40-caliber. A sheriff's deputy testified that he examined bullet holes in a covering on the porch, and they indicated the shots were concentrated to hit a specific thing rather than fired at random.

In his defense, appellant testified he did not shoot Vang. He admitted to driving the vehicle before and after the incident, but the vehicle was a family vehicle and the gunshot residue could have come from his brother who goes to the shooting range. Appellant stated he may have used a firearm to shoot rodents in a chicken coop that week.

Evidence of the Restraining Order Against Appellant

During appellant's testimony, defense counsel asked appellant if there was a reason why he had clothing in the back of the vehicle he was driving, to which he responded, "Well I left my wife about February 8th. I didn't like want to deal with her no more, so I just grabbed my clothes and left, and I told her, you know what I mean?" On cross-examination, the prosecutor attempted to impeach appellant's statement that he left his wife by introducing, with the court's permission over appellant's objection, evidence there was a restraining order prohibiting him from contacting his wife:

"[PROSECUTOR]: Now, [appellant], you didn't really leave your wife, did you?

"[APPELLANT]: Yeah, I left her.

"[PROSECUTOR]: You left her. Isn't it true that were you actually legally prohibited from being in contact with her because of a restraining order?

"[APPELLANT]: Yeah, it's true.

"[PROSECUTOR]: And that was during the time of this alleged shooting and this alleged assault on your uncle; isn't that true?

"[APPELLANT]: That's true.

"[PROSECUTOR]: So she didn't really leave you. You were just prohibited from seeing her; isn't that correct?

"[APPELLANT]: Well I'm not suppose to go see her, you know what I mean, but I didn't want to see her any ways.

"[PROSECUTOR]: So how do you see her and break up with her if you're prohibited from seeing her?

"[APPELLANT]: Because she came and picked me up when I got out of county jail.

"[PROSECUTOR]: So is it your testimony that you violated a restraining order?

"[APPELLANT]: Yeah. I violated a restraining order."

Evidence of Appellant's Arrest for an Uncharged Act

During victim Her's testimony, he mentioned an encounter he had with appellant prior to the February 19, 2016, incident: "That's when he came and got—when I was giving him a ride, he dropped his phone, and then I got his phone. And then he came back and got his phone and I gave it to him. And I guess his sister called the police on him and he got arrested and then he is blaming me." Defense counsel objected based on relevance and Evidence Code section 352. The court sustained the objection and ordered the testimony stricken. Subsequently, outside the presence of the jury, defense counsel moved for a continuance to prepare a motion for mistrial, which the court denied. Defense counsel then orally moved for mistrial, and the trial court denied that motion as well.

Verdict

In connection with the February 21, 2016, incident, the jury convicted appellant of assault with a deadly weapon on Vang (§ 245, subd. (a)(2); count 2), shooting into an inhabited dwelling (§ 246; count 3), and felon in possession of a firearm (§ 29800, subd. (a)(1); count 4). The jury acquitted him of all the charges related to the February 19, 2016, incident and the attempted murder of Vang from the February 21, 2016, incident.

As to count 2, the jury found true allegations that appellant used a firearm within the meaning of section 12022.5, subdivision (a) and inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). As to count 3, the jury found true the allegation that appellant personally and intentionally discharged a firearm, which proximately caused great bodily injury within the meaning of section 12022.53, subdivision (d).

Appellant admitted a prior strike allegation pursuant to section 667, subdivision(a) and two prison prior term allegations pursuant to section 667.5, subdivision (b).

Sentence

As to count 3, appellant was sentenced to the upper term of seven years, doubled to 14 years due to the strike prior, plus a five-year enhancement pursuant to section 667, subdivision (a)(1) and a 25-year-to-life enhancement pursuant to section 12022.53, subdivision (d). As to count 2, appellant was sentenced to the upper term of four years, doubled to eight years due to the strike prior, plus an upper term 10-year enhancement pursuant to section 12022.5, subdivision (a) and a three-year enhancement pursuant to section 12022.7, subdivision (a). The court stayed appellant's sentence as to count 2. As to count 4, appellant was sentenced to a concurrent upper term of three years, doubled to six years due to the strike prior. Appellant's total sentence was 19 years plus 25 years to life.

DISCUSSION

Appellant contends the court erred by allowing the prosecutor to ask appellant about the restraining order as impeachment evidence, contending the evidence was improper impeachment and more prejudicial than probative under an Evidence Code section 352 analysis. Appellant also contends the court abused its discretion by denying defense counsel's motion for continuance to research a motion for mistrial after Her testified that appellant had been arrested, and by denying defense counsel's subsequent oral motion for mistrial. The errors, if any, are clearly harmless.[2]

The thrust of appellant's argument is that the reference to both the restraining order and the arrest unnecessarily and prejudicially portrayed appellant as a violent criminal. Appellant argues the admission of the restraining order line of questioning was unfairly inflammatory and prejudicial and "established that it was highly likely appellant had previously assaulted his wife, possibly on several occasions." Appellant says the evidence of the restraining order "painted an image of appellant as a person who had a criminal past and who continued to engage in serious criminal conduct" and "[t]his likely cemented in the jury's mind that appellant was a violent person who threatened innocent people, and in particular his family and loved ones." Appellant contends: "The admission of the testimony regarding the restraining order proved that appellant had an aggressive disposition and bad character and was predisposed toward violence. This, in turn, prejudiced appellant because the improper testimony went right to the heart of the case."

Similarly, despite the reference to his arrest being ordered stricken from the record, appellant argues the comment constituted "incurable prejudice" and was "too dramatic" for the jury to ignore. He states the mention of the arrest "portrayed appellant

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[2] Appellant contends the alleged errors were cumulatively prejudicial. Our error analysis is cumulative.

as a person of bad character, and the type of individual who would commit the charged felony offenses." Appellant's contentions are not well-taken.

We review alleged errors under the "*Watson* standard." We ask whether it is reasonably probable the outcome would be more favorable to appellant absent the errors. (*People v. Watson* (1956) 46 Cal.2d 818.)[3]

There is no reasonable probability the brief references to the restraining order and appellant's arrest affected the jury's verdict. The jury was clearly not generally prejudiced against appellant given their verdict. They acquitted appellant of his most serious charge and all charges related to the incident involving Her. Appellant's claim the jury would assume the restraining order was the result of a violent assault is tenuous, as no details regarding the facts underlying the restraining order were discussed. The mention of the arrest was a passing remark, which the court struck, and the court instructed the jury to disregard stricken testimony. The references to the restraining order and the arrest were inconsequential, especially considering that the jury was properly informed appellant had been convicted of two felonies of moral turpitude.

The admissible evidence to support appellant's convictions was overwhelming. (See 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Reversible Error, § 55, pp. 586-587.) Vang's testimony left little room for doubt that appellant shot him. In addition, gunshot residue was found on appellant's hands and the inside of the vehicle he was clearly driving the night of the shooting. A .40-caliber casing was also found inside the vehicle, and fragments of .40-caliber bullets were found at the scene. Appellant admitted being at Vang's house the night Vang got shot, and his defense was mere denial. He did not provide an alibi, and there were no other witnesses to the crime.

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3 Appellant urges us to apply the more stringent "*Chapman* standard" of error (*Chapman v. California* (1967) 386 U.S. 18). We do not find appellant has established any alleged error rendered his trial fundamentally unfair so as to implicate any federal constitutional rights requiring us to apply this standard.

For the aforementioned reasons, we find, assuming the court erred when it admitted evidence regarding the restraining order and when it denied defense counsel's motions for continuance and mistrial regarding the mention of appellant's arrest, there is no reasonable probability the outcome would be any more favorable to appellant absent the alleged errors. Thus, any errors were clearly harmless.

RESENTENCING UNDER SENATE BILL NOS. 620 AND 1393

In supplemental briefing, appellant contends we must remand his case to the trial court in light of two laws that have become effective after his initial sentencing but before his case became final. Senate Bill Nos. 620 and 1393 both give trial courts discretion they previously did not have to impose more lenient sentences. Senate Bill No. 620, which went into effect January 1, 2018, amended sections 12022.53 and 12022.5 to allow the trial judge to strike or dismiss enhancements imposed pursuant to those sections. (Stats. 2017, ch. 682, §§ 1, 2.) At the time appellant was sentenced, section 12022.53, subdivision (d) mandated a consecutive enhancement of 25 years to life, and section 12022.5, subdivision (a) mandated a consecutive enhancement of three, four, or 10 years. Similarly, Senate Bill No. 1393, which went into effect January 1, 2019, amended sections 667 and 1385 to eliminate the statutory prohibition on a trial court's ability to strike a five-year enhancement imposed pursuant to section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, §§ 1, 2.) Respondent concedes these laws apply retroactively to appellant's case, and that a remand is appropriate. We accept respondent's concession without further analysis.

DISPOSITION

The matter is remanded to the trial court to determine whether to strike the enhancements under Penal Code sections 12022.53, subdivision (d) and 667, subdivision (a)(1), and if the enhancements are stricken, to resentence appellant.

In all other respects, the judgment is affirmed.

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DE SANTOS, J.

WE CONCUR:

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PEÑA, Acting P.J.

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SMITH, J.